

Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court

Harvey Brownstone.
Toronto: ECW Press, 2009.

Reviewed by Serena Patterson

There was once a time, in the late 1970s and early 1980s, when mental health workers were optimistic about children and divorce. With the advent of no-fault divorce in the 1980s, advice to “stay together for the sake of the children” was more or less set aside, and parents blithely believed that if they were more fulfilled, their children would be better off, as well. That confidence is now widely considered a case of self-delusion. Researchers such as Wallerstein and Kelly,¹ and Amato and Booth² have joined a generation of grown children to raise the alarm about the long-term effects of being caught in what Justice Brownstone refers to as a “Tug of War” between parents.

Unless one dwells in the media space of the religious right, the old morality question of whether or not parents should divorce has been dead for some time. The question has shifted from, “should parents divorce?” to “how should parents divorce?” In part, this is because research can never answer the first question: divorcing and non-divorcing families are very different to begin with, and become more so with exposure to single-parent stigma and poverty. Researchers and advice manuals (of which there are many) now focus on the possibility of a “good divorce” and on the preventability of post-divorce conflict between parents. Justice Brownstone’s book follows this tradition, not passing judgment on divorce itself but hoping for a better outcome if parents behave well. But Brownstone’s book is unique in its focus on the system through which divorce is legally mediated. Although he does not spell out a critique of the family court system, it soon becomes clear that if one were to design a system to help parents achieve a “good divorce,” the law courts would be a poor starting point.

Justice Brownstone’s book should, and probably will, be much recommended and circulated among friends, clients, and professionals. He gives a judge’s eye view of the family court system, including the role and the importance of family law lawyers, the kinds of decisions the court is asked to make, admissible and inadmissible evidence, the reasoning of judges, the limits of what the court can—and cannot—achieve, and the frustration of judges who are faced with woefully unprepared litigants representing themselves. He illustrates these issues with vignettes told, not from the parents’ perspective, but from his own. This makes for gripping reading, and he explains many otherwise incomprehensible experiences of litigants who expected, perhaps

miraculously, a fair and unbiased “day in court,” Judge Judy style. Brownstone is very readable, and his fairness and decency toward the people that he sees in family court is palpable. He humanizes both the litigants and the judges involved in a daunting process.

Much of Justice Brownstone’s book is like a travel guide through a strange land, without which the traveler, already stumbling and disoriented by relationship and family breakdown, would surely be lost. And, like any good travel guide, this one does not pretend to replace the in-vivo expertise of a local who knows both the language and the procedures necessary to navigate: Brownstone is firm in recommending that no one go through family court without a lawyer. Although he spells out many general trends and principles in family law, he stresses the variability across jurisdictions and individual cases. Given the human and financial stakes, his advice to always obtain professional guidance is well-placed, though frustratingly out-of-reach for many parents.

Justice Brownstone also devotes chapters to avoiding litigation through alternatives (mediation, collaborative divorce, and arbitration), and determining when going to court is necessary. He assures us that most divorces, even those involving children, are resolved outside of court (all but approximately ten per cent).

Still, that ten per cent of cases (a rough estimate, Justice Brownstone concedes) absorbs a huge amount of court time and resources, and the notion that “everyone loses, especially the children” remains the most agreed upon truism about family court. No one really knows how many common-law and legal marriages with children simply break up without a divorce order, how many are “resolved” through one partner avoiding conflict and/or agreeing to terms that are dictated by the other, or how many cases return to court after the initial settlement breaks down. Some parents return to court year after year, stopping only after the children become adults. The system that is supposed to help parents to advocate for their children and to reach a resolution is, to most couples, completely destructive to the co-parenting relationship. This is truest when co-parenting skills and trust are especially weak.

Perhaps it is unfair to criticize this book for what it does not do, given that it serves as an exemplary guide. After all, it is in part the lack of a political agenda and gender bias that makes this such a useful book. A fair deal for parents, as Justice Brownstone repeatedly reminds us, is not the goal of family court. In discussing joint custody (and why it is inappropriate in most contested cases), he states,

Custody cases are concerned with the best interests of children, not the best interests of parents. If ... a court concludes that a parent should have custody ... this is not being done to reward or punish anyone. It is being done because it is in the child’s best interests to be in that parent’s custody *despite* his/her faults.

This honesty about the court's viewpoint is invaluable, and many parents might be comforted if they could absorb Brownstone's embedded message of absolution: if one loses, it is not necessarily because one deserves to lose. The absence of false hope based upon assumptions of the "natural" entitlements of mothers, or fathers, is part of what makes the book trustworthy.

Still, this reader longs for more critical analysis. Family law is a powerful agent in the construction of the normative family. It re-creates, reflects, and powerfully enforces expectations of motherhood and fatherhood. What is revealed and what is hidden, what is "relevant" and what is not, what is accepted and what is condemned in family court reflect the economic and moral constraints that bind fathers, and especially mothers, in a particular time, culture, and nation.

It did not escape this reader's attention that the author is a gay man, who honours his "husband" in the book's dedication and introduction. This, I thought, might be the source of his unusual gift of gender neutrality, even fairness, in presenting issues that are commonly obscured by claims of court bias for, or against, women or men. But I also wondered how the role of family court in enforcing gendered expectations could have escaped his attention, given the recent and ongoing struggles of queer parents for equality in family court.

A second quibble that I have with the book is the theme of parental "maturity," which Justice Brownstone repeatedly asserts as the answer to nearly every problem. As a psychologist who is responsible for custody and access evaluations, I am well-acquainted with a literature that seems determined to pathologize any and all parents who find themselves in a legal battle over children. Leading psychological experts hold palpable disdain for conflictual parents, and this parent-blaming bias in the literature contributes to the shame that parents experience in the litigation system. Surely, individual personality disorders or personal maturity account for only part of parental difficulty with the court system. Although Brownstone seeks to humanize parents, I was hoping for a more systemic and less individualized analysis of what goes wrong between former partners now turned litigants. .

What would a system look like, I wonder, that profited from drawing out the best, rather than the worst, from distressed parents? What sustains a system of family law that is rooted in concepts of disputed property, when nearly a century ago we relinquished, in theory, the notion of women and children as chattel? Imagine the reform if we all started from a different place.

¹Wallerstein, Judith, and Joan Kelly. *Surviving the Breakup: How Children and Parents Cope with Divorce*. New York: Basic Books, 1996.

²Amato, Paul, and Alan Booth. *A Generation at Risk: Growing Up in an Era of Family Upheaval*. Cambridge: Harvard University Press, 2000.